

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**TYKEITH L. TURNER,**

Defendant-Appellant.

\_\_\_\_\_ /

**WAYNE COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellee

\_\_\_\_\_

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Attorney for Defendant-Appellant

\_\_\_\_\_

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 336406

Circuit Court No. 95-10246-01

**Defendant-Appellant's Application for Leave to Appeal**

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**STATEMENT OF QUESTIONS PRESENTED**

- I. Did the trial court properly resentence Mr. Turner on his conviction for assault concurrent with resentencing him on his conviction for murder pursuant to *Miller v Alabama* because it was an invalid sentence under the Eighth and Fourteenth Amendments?**

Trial Court answers, “Yes.”

Court of Appeals answers, “No.”

Defendant-Appellant answers, “Yes.”

Plaintiff-Appellee answers, “No.”

**JUDGMENT APPEALED FROM AND RELIEF SOUGHT**

Over 20 years ago, Tykeith Turner was sentenced to mandatory life without the possibility of parole for participating in the murder of Credell Hubbard when Mr. Turner was 16 years old. He was also sentenced to a prison term of parolable life for assault with intent to murder conviction arising from the same incident.

In 2012, the United States Supreme Court declared Mr. Turner's mandatory life without parole sentence unconstitutional in *Miller v Alabama*, which the parties agree entitled Mr. Turner to resentencing.

At the resentencing, Mr. Turner was resentenced to concurrent prison terms of 25 to 60 years for the murder conviction and 20 to 27 years for the assault conviction. The prosecution objected to resentencing on the assault conviction, arguing that it was a valid sentence when it was imposed and that the United States Supreme Court decisions in *Miller v Alabama* and *Montgomery v Louisiana* had no impact on its validity.

This Court should affirm Mr. Turner's sentence of 20 to 27 years in prison for assault with intent to murder. Mr. Turner's original parolable life sentence for assault was an invalid sentence. This is because the assault conviction arose out of the same incident and case as Mr. Turner's murder conviction, meaning both his sentence for murder and his sentence for assault were part of a single sentencing package, infected by the same constitutional errors. Both sentences reflected the trial court's misconception of the law, specifically as it related to a constitutionally appropriate sentence for a juvenile like Mr. Turner. Both sentences were necessarily based upon inaccurate information of a constitutional magnitude.

Finally, the trial court relied on additional inaccurate information, as reflected in the erroneously scored guidelines.

Rather than consider these arguments, the Court of Appeals adopted the prosecution's position, expressed for the first time in the Court of Appeals, that any relief granted by the trial court was procedurally barred by MCR 6.502. *People v Tykeith Turner* (Docket No. 336406), unpublished opinion of the Court of Appeals, attached as Appendix A at 3. In addition, the Court of Appeals failed to consider the multiple legal grounds for resentencing provided by the trial court when it decided to resentence Mr. Turner on his assault conviction. Finally, the Court of Appeals failed to consider additional legal grounds justifying the trial court's ruling asserted by Mr. Turner in his brief on appeal. The Court of Appeals' analysis in this case was cursory, conclusory, and contrary to controlling authorities.

Left uncorrected, the Court of Appeals' clearly erroneous decision will cause Mr. Turner material injustice by preventing him from ever discharging from his prison sentence. MCR 7.305(B)(5)(a). In addition, portions of the Court of Appeals' opinion conflict with other decisions of this Court and the Court of Appeals. MCR 7.305(B)(5)(b).

Finally, the parties agree that this case involves an issue of major significance to the state's jurisprudence. MCR 7.305(B)(3); see Prosecution's Request for Publication, 5/21/18. The proper scope of resentencing under *Miller* has not been directly or clearly addressed by our appellate courts, but is an issue



affecting around 170 of Michigan's juvenile lifers.<sup>1</sup> It is critical for this Court to grant leave to appeal to address this issue and provide necessary guidance to trial and appellate courts as they give effect to *Miller*.

For all of these reasons, this Court should grant leave to appeal and/or reverse the Court of Appeals' decision and affirm the trial court's decision to resentence Mr. Turner for his assault conviction.

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<sup>1</sup> This data was provided by the Law Offices of Deborah A. LaBelle, class counsel for Michigan's juvenile lifers in *Hill v Snyder*, pending in the United States District Court in the Eastern District of Michigan, Docket No. 2:14-cv-14560h.

## STATEMENT OF FACTS

Tykeith Turner was originally sentenced to die in prison for participating in a murder when he was 16 years old. Trial Transcript, 12/5/95 pp 120-121; Sentencing Transcript, 3/22/96 p 55. Mr. Turner participated in a drive-by shooting with a group of teenagers in 1995. Trial Transcript, 12/5/95 p 8-11; Presentence Report, 2/2/96 pp 2-3. In addition to being charged and convicted of first-degree murder, Mr. Turner was convicted of assault with intent to murder based on the same drive-by shooting. Trial Transcript, 12/5/95 pp 120-121. The assault victim was physically unharmed. Resentencing Transcript, 12/21/16 p 43.

### **The Original Sentencing**

Because he was 16 years old at the time of the offense, the trial court was required to decide whether it was more appropriate to sentence Mr. Turner as a juvenile (to five years in a juvenile facility) or an adult (to mandatory life without the possibility of parole). The original sentencing judge, the Honorable Warfield Moore, Jr., observed:

...I don't see this procedure as being the best. I don't know who thought of this statute...Well, I disagree with this. I would employ [sic] the legislature to change this, the statute. My Lord, change it so it helps me because you're putting us into an almost untenable circumstances [sic]. Untenable position as we sit here now.

Sentencing Transcript, 3/22/96 pp 29-30.

The trial court noted that Mr. Turner “may be amenable to treatment,” but expressed concern that it would not be safe for the community if Mr. Turner were to

be released in five or six years through the juvenile system. Sentencing Transcript, 3/22/96 p 50. The trial court stated, "I wish there was something between life imprisonment [and a juvenile sentence]." Sentencing Transcript, 3/22/96 p 51. Judge Moore continued, "I hope that some day some benevolent governor, maybe 20, 25, 30 years from now when you are hopefully a different person than you are today will look on you and in a benign way and allow you to return to society, sir." Sentencing Transcript, 3/22/96 p 51.

The trial court concluded that given the limited options available, it was necessary to sentence Mr. Turner as an adult. Sentencing Transcript, 3/22/96 pp 53-54. Thus, Mr. Turner was sentenced to a mandatory prison term of life without the possibility of parole for the homicide conviction. Sentencing Transcript, 3/22/96 p 55.

The trial court scored the judicial sentencing guidelines for Mr. Turner's assault conviction to be 120 to 300 months, including a score of 100 points for OV 2, reflecting that the assault victim was killed during the offense. Sentencing Information Report attached as Appendix B. Without any discussion of the guidelines range or providing any analysis, the trial court sentenced Mr. Turner to a prison term of parolable life for the assault conviction. Sentencing Transcript, 3/22/96 p 55. Both sentences were made consecutive to the mandatory two-year term for felony-firearm. Sentencing Transcript, 3/22/96 p 55.

## **Mr. Turner's Mandatory Life without Parole Sentence was Unconstitutional**

Subsequent United States Supreme Court decisions held that Mr. Turner's mandatory life without parole sentence was cruel and unusual in violation of his Eighth Amendment rights because he was a juvenile at the time of the offenses. *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455 (2012), and *Montgomery v Louisiana*, \_\_ US \_\_; 136 S Ct 718, 732 (2016).

After the United States Supreme Court decisions in *Miller*, 567 US at 465, and *Montgomery*, 136 S Ct at 732, the Wayne County Prosecutor's Office filed a notice of its agreement that Mr. Turner should be resentenced to a term-of-years sentence for his homicide conviction. See Notice of Intent to Seek Term-of-Years Sentence under MCL 769.25a(4)(c), 7/22/16, contained in Circuit Court file.

## **The Resentencing**

Prior to resentencing, Mr. Turner asserted that his resentencing pursuant to *Miller* and *Montgomery* necessarily included resentencing on his assault conviction, as well as his murder conviction. At the prosecutor's insistence, and only as a courtesy, Mr. Turner filed a motion for relief from judgment on the same grounds. See Motion for Relief from Judgment, 11/26/16 ¶ 4.

In his motion, Mr. Turner asserted that the motion for relief from judgment was a proper successive motion for relief because his entitlement to relief resulted from a retroactive change in the law. Motion for Relief from Judgment, 11/26/16 ¶ 6. In addition, Mr. Turner asserted that the assault sentence was invalid because it

was based upon a misconception of the law and inaccurate information of a constitutional magnitude. Brief in Support of Motion for Relief from Judgment, 11/26/16.

In its response, the prosecutor asserted that *Miller* and *Montgomery* address only mandatory life without parole sentences for juveniles, and have no impact upon or application to Mr. Turner's assault sentence. Response to Motion for Relief from Judgment, 12/14/16. The prosecutor asserted that Mr. Turner could not establish prejudice because the assault sentence was valid when it was imposed. Response to Motion for Relief from Judgment, 12/14/16. The prosecutor did not assert that the motion for relief from judgment was barred by MCR 6.502. Response to Motion for Relief from Judgment, 12/14/16.

At the resentencing, the original judge's successor, the Honorable Richard M. Skutt, first addressed Mr. Turner's sentence for murder. Mr. Turner accepted responsibility for his role in the shooting that took the life of another young man and apologized to the victim's family for taking their loved one from them. Resentencing Transcript, 12/21/16 pp 16-17. Judge Skutt noted the significant progress Mr. Turner made over the years towards rehabilitation, including his increasingly positive disciplinary record and his excellent employment history in the Department of Corrections. Resentencing Transcript, 12/21/16 pp 19-20. Judge Skutt determined that a sentence of 25 to 60 years in prison was appropriate for Mr. Turner's murder conviction. Resentencing Transcript, 12/21/16 p 21.

Then, the trial court considered whether it was appropriate to resentence Mr. Turner for his assault conviction as well. Appellate counsel reasserted Mr. Turner's position that a motion for relief from judgment was not necessary to put the matter before the court. Resentencing Transcript, 12/21/16 pp 23-24, 32.

After hearing the parties' arguments, the trial court granted Mr. Turner's request and said:

In *People versus Whalen*,<sup>2</sup> 412 Mich. at 166 at pages one sixty-nine through one seventy they list those conditions. In addition to the constitutionally impermissible considerations the Court also recognized situations where the sentencing court, and I quote, fails to exercise its discretion because it's laboring under a misconception of the law, and that's at page one seventy.

When I reviewed the transcript of the sentencing that was done by Judge Moore it tells me that the Defendant should prevail in this case.

...

Now, it's clear to me from Judge Moore's comments that his sentence were [sic] imposed solely on his understanding of the mandatory life without parole statutory penalty for first degree murder. From his comments it's evident that he failed to exercise any possible discretion he may of had on the assault with intent to murder charge solely because of his understanding there was no mechanism for parole unless, as he had earlier noted, some benevolent Governor granted clemency in the far distant future. I find, therefore, the decision in *Miller* and *Montgomery* form the basis for filing of the subsequent motion for relief from judgment as well as a basis for finding that the sentence imposed for the assault with intent to murder charge was invalid or is invalid at the present time.

Resentencing Transcript, 12/21/16 pp 38-40.

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<sup>2</sup> See *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981)

Thereafter, the trial court resentenced Mr. Turner to a prison term of 20 to 27 years for his assault conviction, to be served concurrently with his sentence for murder and consecutive to a mandatory two-year prison term for felony firearm. Resentencing Transcript, 12/21/16 p 44.

### **Appellate Proceedings**

The prosecution appealed as of right and asserted that the trial court reversibly erred by resentencing Mr. Turner for assault concurrent with his resentencing for murder. Prosecution's Brief on Appeal, 4/4/17. On appeal, the prosecution argued for the first time that Mr. Turner's resentencing was barred by MCR 6.502(G).

Following briefing by the parties and oral argument, the Court of Appeals issued a per curiam opinion reversing the trial court and ordering the trial court to reinstate Mr. Turner's parable life sentence for assault. *People v Tykeith Turner* (Docket No. 336406), unpublished opinion of the Court of Appeals, attached as Appendix A. The Court of Appeals concluded that Mr. Turner's resentencing was barred by MCR 6.502(G) because, even though *Miller v Alabama*<sup>3</sup> was a retroactive change in the law, it did not apply to Mr. Turner's assault sentence. Appendix A at 3. It went on to conclude that Mr. Turner could not establish actual prejudice under MCR 6.508(D)(3)(2). *Id.* The court noted that life imprisonment is a valid sentence for assault with intent to murder and concluded that *Miller* did not invalidate the

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<sup>3</sup> *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455, 2460 (2012).

sentence because “*Miller* only applies to mandatory life imprisonment without parole.” *Id.*



## ARGUMENT

- I.     **The trial court properly resentenced Mr. Turner on his conviction for assault concurrent with resentencing him on his conviction for murder pursuant to *Miller v Alabama* because it was an invalid sentence under the Eighth and Fourteenth Amendments. The Court of Appeals erroneously reversed the decision below.**

### **Issue Preservation**

Mr. Turner preserved all of his arguments for appellate review in the trial court. Resentencing Transcript, 12/21/16; Motion for Relief from Judgment, 11/26/16.

The prosecution failed to make any objection in the trial court under MCR 6.502(G), resulting in waiver and/or forfeiture of that issue. *C.f. People v Swain*, 288 Mich App 609, 628 FN 4; 794 NW2d 92 (2010) (noting that the prosecution did not waive a successive motion argument because the prosecution's objection on that basis in the trial court preserved the issue for appellate review).

### **Standard of Review**

Constitutional questions and questions of law are reviewed de novo. *People v Carp*, 496 Mich 440, 460; 852 NW2d 801 (2014) (citations omitted).

A trial court's order granting a motion for relief from judgment is reviewed for an abuse of discretion and the findings of fact are review for clear error. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003).

## Discussion

This Court should review this issue as on direct review as Mr. Turner's resentencing on the assault conviction was necessarily part and parcel of his resentencing on the murder conviction pursuant to *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455, 2460 (2012), and *Montgomery v Louisiana*, \_\_ US \_\_; 136 S Ct 718, 732 (2016). Should this Court disagree, Mr. Turner established his entitlement to relief under MCR 6.500, *et seq.* The relief granted below was not procedurally barred and the Court of Appeals' conclusions to the contrary are inconsistent with state and federal authorities. In addition, the Court of Appeals erroneously concluded the relief granted was procedurally barred under MCR 6.502, by giving short shrift to *Miller* and ignoring the prosecution's waiver/forfeiture of that issue in the trial court.

The trial court properly resentenced Mr. Turner on his assault with intent to murder conviction, for which he was originally sentenced to a prison term of parolable life. This is because the assault conviction arose out of the same incident and case as Mr. Turner's murder conviction, meaning both his sentence for murder and his sentence for assault were part of a single sentencing package, infected by the same constitutional errors. Both sentences reflected the trial court's misconception of the law, specifically as it related to a constitutionally appropriate sentence for a juvenile like Mr. Turner. Both sentences were necessarily based upon inaccurate information of a constitutional magnitude. Finally, the trial court relied on additional inaccurate information, as reflected in the erroneously scored

guidelines. The Court of Appeals' opinion failed to address these arguments, even though some of them served as the express basis for the trial court's ruling below.

**A. This Court should consider this issue as on direct review because Mr. Turner was entitled to be resentenced on his assault conviction as part of his resentencing on his murder conviction.**

The Court of Appeals presumed that its review of this issue should be pursuant to MCR 6.500, *et seq.* Appendix A at 2. However, Mr. Turner asserted in the trial court and maintains that his resentencing on the murder conviction necessarily should have included resentencing on his assault conviction. E.g. Motion for Relief from Judgment, 11/26/16 ¶ 4. Although Mr. Turner filed a motion for relief from judgment in the trial court, at the prosecutor's request, he preserved his position in the trial court that it was not necessary for him to file a motion for relief from judgment to obtain resentencing on the assault conviction. He repeatedly asserted that he was entitled to be resentenced on his assault conviction as part of the resentencing on his murder conviction because they were part of a sentencing package infected by the same errors. See Resentencing Transcript, 12/21/16 pp 23-24, 32. The Court of Appeals failed to even consider this argument in its opinion, even though it was thoroughly briefed by the parties. Defendant's Brief on Appeal, 7/11/17 at 8-10; Prosecution's Reply Brief, 8/1/17 at 2-7.

Resentencing on both offenses is consistent with general sentencing practices in Michigan. For example, where appellate courts vacate one conviction, they typically remand for resentencing on the remaining convictions because the

erroneous conviction amounts to inaccurate information relied upon in imposing the other sentences. E.g. *People v Collins*, 298 Mich App 458, 471; 828 NW2d 392 (2012). Similarly, where the same sentencing error affects multiple sentences (i.e. the same inaccurate information about a defendant's criminal history), this Court has required resentencing on all of those sentences. E.g. *People v Jackson*, 487 Mich 783, 792-793; 790 NW2d 340 (2010). Michigan's appellate courts have consistently applied the same logic in these cases as the trial court applied here – the error in the controlling sentence or conviction was also an error rendering the lesser sentence invalid because the court necessarily relied upon the first error when imposing the lesser sentence. C.f. *Jackson*, 487 Mich at 792-793 and *Collins*, 298 Mich at 471 with Resentencing Transcript, 12/21/16 pp 38-40.

Mr. Turner is entitled to resentencing for his assault conviction because the sentence is invalid in light of *Miller* and *Montgomery*. See MCL 769.24; *People v Pontius*, 485 Mich 970; 774 NW2d 693 (Mem) (2009). While MCL 769.24 precludes the trial court from wholly setting aside the judgment on the basis of a sentencing error, it does allow the trial court to remedy invalid sentences. This statute does not preclude relief because Mr. Turner does not seek to have his convictions set aside on the basis of the sentencing errors, but rather seeks only the limited relief he is entitled to: resentencing on an invalid sentence. Similarly, the Court in *Pontius* clarified that where a trial court imposes a sentence that is partially invalid, only the invalid part of the sentence may be set aside. *Pontius*, 485 Mich at 970.

Consistent with *Pontius*, Mr. Turner only seeks resentencing on those sentences rendered invalid by *Miller* and *Montgomery*.

Resentencing Mr. Turner on his concurrent conviction is also consistent with the sentencing practices of other states that have considered this issue. For example, the Wyoming Supreme Court has considered the issue in multiple cases and concluded resentencing under *Miller* required resentencing on concurrent convictions because those life without parole sentences, "...may have impacted the sentencing decisions with respect to [the other] convictions." *Sen v State*, 301 P3d 106, 127 (WY 2013); see also *Bear Cloud v State*, 334 P3d 132 (WY 2014).

This Court should affirm the trial court's decision to resentence Mr. Turner on the assault conviction. This Court should also clarify that resentencing on concurrent convictions following *Miller* and *Montgomery* is required as a matter of law and that defendants like Mr. Turner need not file a motion for relief from judgment in order to be so resentenced.

**B. Even when reviewed as a motion for relief from judgment, Mr. Turner established his entitlement to resentencing for assault.**

Even if this Court disagrees and reviews this issue pursuant to MCR 6.500, *et. seq.*, Mr. Turner was entitled to relief because he established good cause and prejudice under MCR 6.508(D)(3). Mr. Turner could not raise this issue on direct appeal because his entitlement to relief was based upon a recent change in the law that applied to him retroactively. See MCR 6.508(D)(3)(a); *Miller*, 567 US at 465; *Montgomery*, 136 S Ct at 732. Mr. Turner has been prejudiced because the assault

sentence is invalid. See MCR 6.508(D)(3)(b)(iv).

1. **Mr. Turner's entitlement to relief under MCR 6.500, *et seq*, is triggered by *Miller v Alabama*, which applies retroactively to his case under *Montgomery v Louisiana*.**

While Mr. Turner previously filed a motion for relief from judgment, he was not barred from filing a successive motion for relief from judgment on the present issue because his entitlement to relief was the result of the change in the law brought about by the *Miller* decision, which applies retroactively to Mr. Turner under *Montgomery*. See 6.502(G)(2); *Montgomery*, 136 S Ct at 732.

While the *Montgomery* decision did not directly address sentences like Mr. Turner's sentence for assault, the decision rendered Mr. Turner's life without the possibility of parole sentence constitutionally invalid. Both sentences were imposed at the same time, meaning the trial court's sentence for assault was necessarily affected by the misconception of law that led it to impose an unconstitutional sentence of life without parole. Further, the trial court relied on inaccurate information in imposing both sentences where it operated under the belief that Mr. Turner could never be eligible for parole. Thus, the errors that render the assault sentence invalid are a consequence of the *Miller* decision, which, the prosecution agrees, applies retroactively to Mr. Turner. See Prosecution's Brief on Appeal, 4/4/17 p 10.

The Court of Appeals' conclusion that *Miller* and *Montgomery* have no impact on Mr. Turner's assault sentence fails to account for the fact that the now

unconstitutional sentence of life without the possibility of parole was a necessary part of the court's consideration, factually and legally, when it imposed the sentence for assault.

In short, Mr. Turner's entitlement to relief was triggered by *Miller* and the retroactive application of that decision to his case. Thus, Mr. Turner satisfied the requirements of MCR 6.502(G)(2).

**a. The prosecution waived and/or forfeited its arguments to the contrary by failing to raise them in the trial court.**

On appeal, the prosecution asserted for the first time that Mr. Turner's motion for relief from judgment was barred by MCR 6.502(G)(2) and that the trial court abused its discretion by failing to summarily dismiss it on that basis. Prosecution's Brief on Appeal, 4/4/17 pp 8-9. Where, the prosecution failed to make any objection in the trial court on the basis of MCR 6.502(G)(2), any objection raised for the first time on appeal is waived and/or forfeited. C.f. *People v Swain*, 288 Mich App 609, 628 FN 4; 794 NW2d 92 (2010) (noting that the prosecution did not waive a successive motion argument because the prosecution's objection on that basis in the trial court preserved the issue for appellate review). The trial court did not abuse its discretion by failing to consider an objection that was never made.

However, the Court of Appeals analyzed the prosecution's successive motion argument as if it was preserved. This was clearly erroneous, especially in light of the deferential abuse of discretion standard. See *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003) ("At its core, an abuse of discretion standard

acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment.”)

**2. Mr. Turner's sentence for assault was constitutionally invalid and entitled him to resentencing under MCR 6.500, *et seq.***

Mr. Turner was entitled to relief (i.e. resentencing on the assault conviction) under MCR 6.500, *et. seq.*, because there was good cause and prejudice under MCR 6.508(D)(3). The prosecution agrees that Mr. Turner could not raise this issue on direct appeal because his argument for relief is based upon a recent change in the law. Prosecution's Brief on Appeal, 4/4/16 p 13; see MCR 6.508(D)(3)(a). In other words, it is undisputed that Mr. Turner established good cause.

Mr. Turner established prejudice because the assault sentence was invalid for several reasons, none of which were considered by the Court of Appeals. See MCR 6.508(D)(3)(b)(iv); Appendix A. A judge's authority to resentence a defendant is limited to those situations in which the original sentence is invalid. *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981). A sentence within statutory limits is invalid where the court fails to exercise its discretion because it is operating under a misconception of law. *Id.* A sentence is also invalid where the court relies upon constitutionally impermissible considerations, such as inaccurate factual information. *Id.*



These bases for resentencing are consistent with Mr. Turner's due process rights to be sentenced on the basis of accurate information. US Const, Ams V, XIV; Const 1963, art 1, § 17; *Townsend v Burke*, 334 US 736, 741-742; 68 S Ct 1252 (1948); *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006); *People v Miles*, 454 Mich 90, 100; 59 NW2d 299 (1997); *Whalen*, 412 Mich at 169-170. A sentence is invalid if it is based upon inaccurate information, e.g. *Francisco*, 474 Mich at 89, especially when that inaccurate information is of a "constitutional magnitude." *Roberts v United States*, 445 US 552, 556; 100 S Ct 1358 (1980); see also *United States v Tucker*, 404 US 443, 447; 92 S Ct 589 (1972); *Townsend*, 334 US at 741.

In addition, the Eighth Amendment prohibits the imposition of sentences that deny a "meaningful opportunity to obtain release..." "for all but the rare juvenile offender" who is irreparably corrupt or incapable of rehabilitation. US Const, Am VIII; *Miller*, 567 US at 479-480; *Montgomery*, 136 S Ct at 724. This is because the "penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* at 733 (citations omitted).

As discussed above, the critical issue in analyzing the trial court's decision in this case is whether the assault sentence was invalid. The trial court properly concluded the assault sentence was invalid and thus acted within its discretion by resentencing Mr. Turner on that conviction.

- a. **Both sentences were invalid because they were based upon the same misconception of the law.**

Mr. Turner's assault sentence was invalid because it was based upon a mistake or misconception of law. See *Whalen*, 412 Mich at 169-170. At the time of the original sentencing, the trial court operated under the misconception that a mandatory term of life without parole was a constitutionally permissible sentence and imposed that sentence for Mr. Turner's murder conviction. C.f. *Miller*, 567 US at 465. This error of law, as subsequently established by our United States Supreme Court, was also relied upon when the original sentencing judge sentenced Mr. Turner to parolable life for assault. Resentencing Transcript, 12/21/16 pp 38-40. The life without parole sentence for murder subsumed the concurrent assault sentence, making it of no practical consequence. Resentencing Transcript, 12/21/16 pp 37-38 ("So any possibility of parole on the assault charge was essentially a meaningless determination").

Our appellate courts regularly recognize that a sentence that was valid when it was imposed can become invalid based upon a subsequent change in the law or clarification of existing law that shows the original sentencing judge relied upon a misconception of law at the original sentencing. See *People v Thomas*, 223 Mich App 9, 12; 566 NW2d 13 (1997) (citing several cases remanding for resentencing where the original trial judge imposed the original sentence based upon a misconception of the law). The traditional remedy for invalid sentences imposed based on a mistake of law is resentencing. *Id.* This is because it is impossible to determine whether the

judge would have exercised his discretion differently absent the misconception of law. *People v Green*, 205 Mich App 342, 347; 517 NW2d 782 (1994); see also *People v McCracken*, 172 Mich App 94; 431 NW2d 840 (1988) (remanding for resentencing and noting that “the trial court may not have put the appropriate amount of judicial effort into the sentencing decision and carefully weighed the sentencing factors because of its belief that it was essentially irrelevant what sentence was imposed.”).

The Court of Appeals failed to reconcile its conclusion that Mr. Turner cannot establish prejudice with any of these authorities. Appendix A at 3. In contrast, the trial court properly concluded that Mr. Turner’s assault sentence was invalid and granted his motion for relief from judgment on that basis.

**b. Both sentences were invalid because they were based upon the same misinformation of a constitutional magnitude.**

In addition to relying upon a misconception of law, as noted by the trial court, the original sentencing judge relied upon misinformation of a constitutional magnitude when imposing the assault sentence.

In *Tucker*, the United States Supreme Court determined that the sentencing court relied upon “misinformation of constitutional magnitude” where the “prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue,” and as a result was constitutionally entitled to resentencing. *Tucker*, 404 US at 447, quoting *Townsend*, 334 US at 741.

The Michigan Supreme Court recognized the same principle when it adopted the United States Supreme Court’s reasoning in *Tucker*. See *People v Moore*, 391

Mich 426, 436-437; 216 NW2d 770 (1974). Like in *Townsend* and *Tucker*, the defendant in *Moore* was sentenced by a trial court that relied upon constitutionally invalid prior convictions in forming a sentence. *Townsend*, 334 US at 741; *Tucker*, 404 US at 447; *Moore*, 391 Mich at 436-437. Both Courts recognized that the defendants were entitled to resentencing because the trial courts relied upon assumptions about their criminal records that were materially untrue. *Id.* In other words, “if the sentencing judge ‘had been aware of the constitutional infirmity of...the previous convictions, the factual circumstances of the respondent’s background would have appeared in a dramatically different light at the sentencing proceeding.’” *Moore*, 391 Mich at 436-437, citing *Tucker*, 404 US at 448.

Here, the “misinformation of constitutional magnitude” was a constitutionally invalid sentence of life without the possibility of parole. See *Miller*, 567 US at 465. In cases where trial courts were statutorily required to impose a sentence of life without the possibility of parole for juveniles’ first-degree murder convictions, the sentences imposed regarding any other convictions arising out of the same case had no practical effect. This is because under the law at the time, the juvenile would never be released from prison because he would never be eligible for parole, regardless of any secondary sentences imposed by the court. If the original sentencing judge had been aware that Mr. Turner would be eligible for parole and eventual discharge from his murder sentence, the court might have imposed a lesser term for the assault conviction.

While the trial court did not address this argument specifically at the resentencing, it provides an additional basis for finding Mr. Turner's assault sentence invalid.

**c. Mr. Turner's assault sentence was invalid because it was based on erroneously scored guidelines, reflecting inaccurate factual information to the degree that it violated due process.**

The trial court acted within its discretion when it found Mr. Turner's assault conviction invalid because it was based upon inaccurate information as reflected in the erroneous scoring of the guidelines at the original sentencing. Resentencing Transcript, 12/21/16 pp 34-35; Appendix B. The trial court at resentencing noted that at the original sentencing, Offense Variable 2 (OV2) under the judicial guidelines was improperly scored at 100 points, reflecting the victim of the assault was killed during the offense. The scoring error represented additional misinformation relied upon by the trial court at the original sentencing, as the victim of the assault was not physically injured in any way. Resentencing Transcript, 12/21/16 p 43.

The trial court properly concluded that the original sentencing judge relied upon additional inaccurate information at the original sentencing in violation of Mr. Turner's due process rights. See *People v Raby*, 456 Mich 487, 496-498; 572 NW2d 655 (1998) (noting that a scoring error under the judicial guidelines warrants resentencing where the error shows the trial court relied on inaccurate information in violation of a defendant's due process rights) (citations omitted).

While the prosecution objected to the judge's ruling related to the scoring of OV 2 at the resentencing, Resentencing Transcript, 12/21/16 pp 41-42, it did not reassert any of these arguments in its brief on appeal. Thus, the prosecution abandoned any issue related to this independent basis for the trial court's ruling. *People v Iannucci*, 314 Mich App 542, 545; 887 NW2d 817, 819 (2016) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.") (citation omitted).

The Court of Appeals' opinion erroneously dismissed this independent basis for finding Mr. Turner's assault conviction invalid because "life is and was a valid sentence for an AWIM conviction." Appendix A at 3. The Court of Appeals stated, "Because we conclude that the original life sentence for the AWIM conviction was valid and should be reinstated, we do not address this argument." *Id.* at 4, FN 2. This portion of the Court of Appeals' analysis is also clearly erroneous as it would serve as a basis to ignore all guidelines errors so long as the sentenced imposed is within the statutory maximum, contrary to this Court's well-established authorities. See *Raby*, 456 Mich at 496-498.

**d. Other states that have considered this issue concluded that resentencing pursuant to *Miller* requires resentencing on concurrent convictions.**

Appellate courts in other jurisdictions have found that it is appropriate to resentence on all counts in cases where juveniles are being resentenced pursuant to *Miller* and *Montgomery*. See *Sen v State*, 301 P3d 106; 2013 WY 47 (2013); *Bear*

*Cloud v State*, 334 P3d 132; 2014 WY 113 (Wy 2014); *Purdy v State*, \_\_\_ So 3d \_\_\_; 2017 WL 384094 (2017 Fla Dist Ct of App). In *Sen v State*, the Wyoming Supreme Court held it was appropriate to vacate and remand for resentencing on all of Mr. Sen's sentences after finding that his life imprisonment without parole sentence for first degree felony murder violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Sen*, 301 P3d 106. The court noted that Mr. Sen's sentence of life without the possibility of parole "may have impacted the sentencing decisions with respect to his conspiracy and aggravated burglary convictions." *Id.* at 127.

The Wyoming Supreme Court agreed with its decision in *Bear Cloud v State*, 334 P3d 132. In *Bear Cloud*, the defendant pled guilty to first degree murder, aggravated burglary, and conspiracy to commit aggravated burglary. *Bear Cloud*, P3d at 135. He was sentenced to life in prison "according to law" for the first degree murder, and 20 to 25 years on both the aggravated burglary and conspiracy to commit aggravated burglary counts. *Id.* Following an appeal, his case was remanded for resentencing on the first degree murder conviction only. *Id.* at 135-136. Mr. Bear Cloud was then resentenced to life in prison with the possibility of parole after serving 25 years on the first degree murder conviction. *Id.* at 137. He again appealed his sentence. *Id.* The Wyoming Supreme Court held that Mr. Bear Cloud was entitled to resentencing on all counts and acknowledged its error in its previous ruling only remanding the first degree murder conviction for resentencing.

*Id.* at 141. The court noted that this error was inconsistent with its previous holding in *Sen* as well as with the United States Supreme Court law on the matter. *Id.*

The court in *Bear Cloud* relied in part on *Pepper v United States*, where the United States Supreme Court rejected the argument that a sentencing court on remand is required to maintain a portion of a sentence that is not challenged on appeal. *Pepper v United States*, 562 US 476; 131 S Ct 1229 (2011). In *Pepper*, the Court noted that “a criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.” *Id.* at 507 (quoting *United States v Stinson*, 97 F 3d 466, 469 (CA 11, 1996)). The Court also reasoned that a sentencing court’s “original sentencing intent may be undermined by altering a portion of the calculus.” *Id.* (quoting *United States v White*, 406 F 3d 827, 832 (CA 7, 2005)), and therefore an appellate court may vacate a defendant’s entire sentence when reversing one part of the sentence. *Id.* (citing *Greenlaw v United States*, 554 U.S. 237, 253; 128 S Ct 2559 (2008)). This then allows the sentencing court to adjust its total sentencing package to the changes made to the part of the sentence that was reversed. *Id.*

The Sixth Circuit Court of Appeals has similarly treated concurrent convictions as resulting in a “sentencing package,” and has a general presumption of de novo resentencing. See, e.g. *United States v Faulkenberry*, 759 F Supp 2d 915, 921 (SD Ohio 2010), *aff’d*, 461 F App’x 496 (6th Cir 2012) (“When considering a multiple-count criminal judgment that produced ‘interdependent’ sentences, we may vacate all sentences even if only one is reversed on appeal.”)



**e. The Court of Appeals' decision and remand lead to disproportionate and unconstitutional results.**

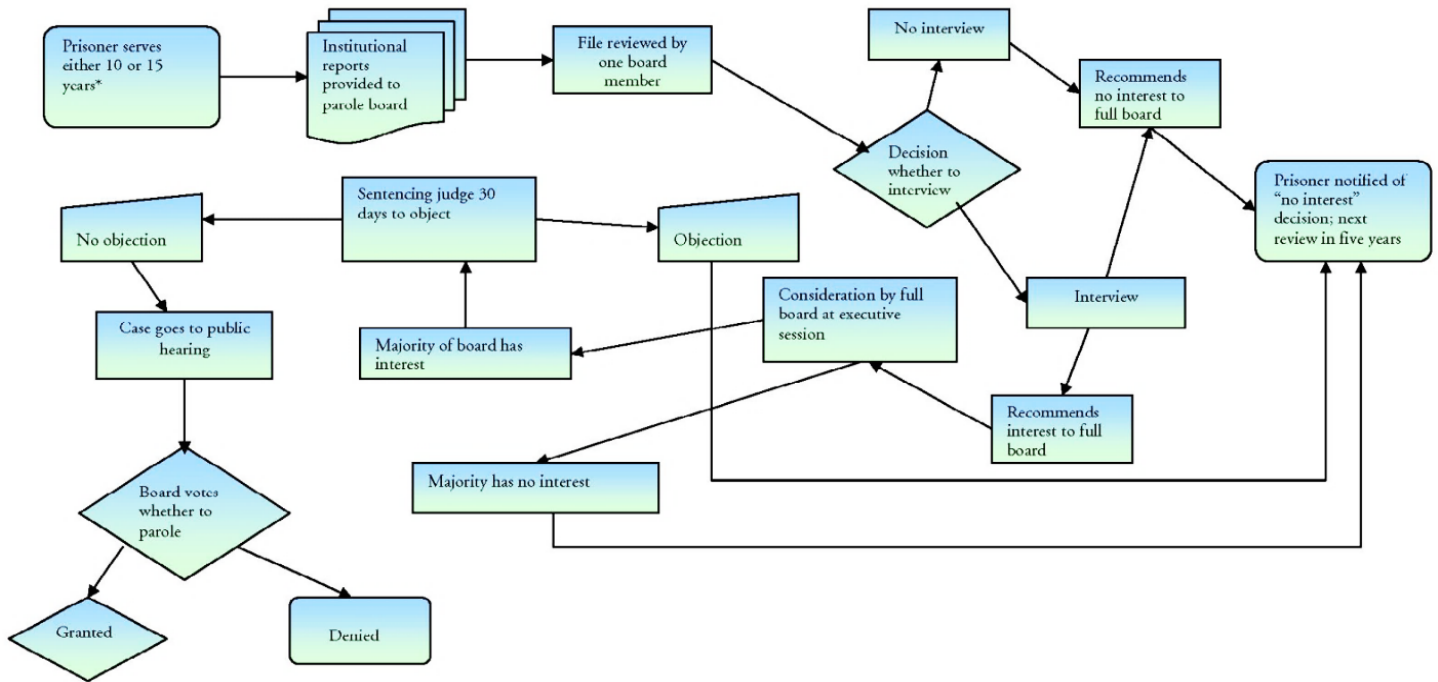
The Court of Appeals' decision in this case, that Mr. Turner's parolable life sentence for assault remained valid in light of his constitutionally mandated resentencing to a term of years for his murder conviction, leads to unjust and unconstitutional results. Left uncorrected, Mr. Turner's parolable life sentence would be unreasonably disproportionate to his murder sentence. It also would have served as an additional barrier and potential hindrance to the meaningful opportunity for release mandated by *Miller*, in violation of Mr. Turner's Eighth Amendment rights.

Left uncorrected, Mr. Turner's parolable life sentence for assault would be, for all practical purposes, a harsher sentence than his 25 to 60 year prison term for murder. Under the murder sentence, Mr. Turner is eligible for parole after serving 25 years. Were the parole board to deny him parole indefinitely, Mr. Turner would be entitled to release after serving 60 years.

Under the original assault sentence, Mr. Turner would have been eligible for parole after serving 15 years, but would have been subject to a much more burdensome parole process. The parole process for lifers is markedly different and more complex than the process for those serving term of years sentences. A chart summarizing the process lifers must go through appears below.<sup>4</sup>

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<sup>4</sup> This chart is an updated version of a chart originally created by Citizens Alliance on Prisons & Public Spending available at <http://www.capps-mi.org/wp-content/uploads/2013/03/5.4-Michigan-parole-process-for-lifers.pdf>.



\*Years of service required by Lifer Law for parole eligibility depends on whether offense was committed before or after Oct. 1, 1992.

While an individual serving a parolable life term is eligible for parole after serving 10 or 15 years in prison, in reality individuals serving parolable life terms are rarely, if ever released on parole. *Foster v Booker*, 595 F 3d 353, 366 (CA 6 2010) (finding that the percentage of parole-eligible lifers who were released was only 0.15% on average in recent years). A former chairperson of the parole board testified before the state legislature: "It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that --- life in prison." Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).

Further, the parolable life term could prevent Mr. Turner from being discharged from the MDOC even after he has served the statutorily imposed

maximum term of 60 years for his murder conviction. In other words, Mr. Turner could be imprisoned for an offense in which no one was physically injured long after he was discharged from a sentence imposed for murder.

The practical effect of the parolable life term would violate Mr. Turner's constitutional right to be free from cruel andor unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. In *Graham v Florida*, 560 US 48; 130 S Ct 2011 (2010), *Miller*, 567 US 460, and *Montgomery*, 136 S Ct 718, the United States Supreme Court placed constitutional limits on the sentences that may be imposed on children. *Graham* barred sentences of life without parole for children convicted of nonhomicide offenses and held that such offenders must have a “realistic” and “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 US at 75, 82.

*Miller* and *Montgomery* established that children must have this same meaningful opportunity for release even in homicide cases—except in the rarest of cases where it is determined that the particular child “exhibits such irretrievable depravity that rehabilitation is impossible.” *Montgomery*, 136 S Ct at 733. Not only that, but in *Montgomery*, the United States Supreme Court clarified that, “*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of ‘the distinctive attributes of youth.’” *Id.* (citations omitted).

Numerous state supreme courts have concluded that sentences not technically labeled “life without parole” violate the Eighth Amendment as applied to children if those sentences do not provide a realistic opportunity to obtain release at a meaningful point in an individual’s life as required by *Graham*, *Miller* and *Montgomery*. See e.g., *State v Ramos*, 187 Wash 2d 420; 387 P 3d 650 (Wash 2017) (applying *Miller* to defendant’s aggregate 85-year sentence, concluding that the case “clearly” applies to “any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation”); *State v Zuber*, 227 NJ 422; 152 A 3d 197 (NJ 2017) (applying *Miller* and *Graham* to defendants’ 110-year and 75-year sentences); *State v Moore*, 149 Ohio St 3d 557; \_\_ NE 3d \_\_ (Ohio 2016) (holding that *Graham* applies to 112-year aggregate sentence for multiple nonhomicide offenses); *People v Reyes*, 63 NE3d 884 (Ill 2016) (concluding that a mandatory aggregate sentence of 97 years’ imprisonment violates *Miller*); *Henry v State*, 175 So 3d 675, 680 (Fla 2015) (remanding a 90-year aggregate sentence for multiple nonhomicide offenses because *Graham* is not limited to the “exclusive term of ‘life in prison’” and a juvenile offender must have a meaningful opportunity to obtain release during his or her natural life); *State v Boston*, 363 P3d 453 (Nev 2015) (concluding that aggregate sentence requiring 100 years in prison before parole violates *Graham*); *Casiano v Commissioner*, 115 A3d 1031 (Conn 2015) (holding *Miller* applicable to a sentence of 50 years without parole); *Brown v State*, 10 NE3d 1 (Ind 2014) (holding that defendant’s aggregate sentence of 150 years’ imprisonment “forfeits altogether

the rehabilitative ideal” and exercising state constitutional authority to impose a lesser sentence); *People v Caballero*, 282 P3d 291 (Cal 2012) (holding that total effective term of 110 years-to-life for nonhomicide offense is prohibited under *Graham*).

The Eighth Amendment is not triggered by the magic words “life without parole,” but rather by any sentence that does not allow a person convicted as a child the opportunity to obtain release upon demonstrating he or she is not irreparably corrupt. *Montgomery*, 136 S Ct at 736. Once Mr. Turner was resentenced to a term of years for murder, the parolable life term would have diminished Mr. Turner’s likelihood of obtaining release on parole for both offenses, potentially for the rest of his life, in violation of his Eighth Amendment rights. Compare *Miller*, 567 US at 479-480, quoting *Graham*, 560 US at 48, 75. The trial court recognized this when it stated:

The Defendant could serve the full sixty years and not be granted parole on the life -- or on the term of years sentence and still not be granted parole on the less serious charge of assault with intent to commit murder and as defense counsel indicated that means he could die in prison which is contrary to both the decision to proceed with by the Prosecutor’s Office and the decision of this Court on resentencing.

Resentencing Transcript, 12/21/16 p 37.

For these reasons, the original parolable life sentence would have delayed and hindered Mr. Turner’s meaningful opportunity for release, in violation of the Eighth Amendment.

**SUMMARY AND REQUEST FOR RELIEF**

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant Tykeith Turner, asks that this Honorable Court grant leave to appeal and/or affirm the trial court's ruling and affirm his sentence of 20 to 27 years in prison for assault.

Respectfully submitted,

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Dated: July 12, 2018